Supreme Court, U.S.
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No. 98-88

In The

Supreme Court of the United States

October Term, 1998

RICHARD E. FLESHMAN,

Petitioner,

v.

TOGO D. WEST, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONER

JEFFREY T. GREEN*
STEPHEN F. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Petitioner

**Counsel of Record*

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REPLY BRIEF FOR PETITIONER

One of the most common tactics employed by respondents to defeat a Petition for Certiorari is to divert attention from certworthy issues by throwing up a host of purported procedural obstacles to review. The Brief in Opposition filed by the Solicitor General on behalf of the Secretary of Veterans Affairs in this matter is a case in point. Rather than make a serious attempt to confront the two issues raised in the Petition – which are important to the proper administration of the veterans benefits statutes – the Solicitor General erroneously asserts that *neither* of those issues is presented in this case.

Ultimately, however, the Brief in Opposition is more revealing for what it does *not* say rather than what it does say. Even the Solicitor General cannot bring himself to deny that question one, which involves the resolution of a noted conflict in this Court's cases concerning in whose favor (the claimant's or the government's) courts should resolve ambiguity in the veterans statutes, presents a certworthy issue ripe for resolution by this Court. Likewise, the Solicitor General makes no attempt to defend the Federal Circuit's rule of law that the government should win in cases of ambiguity – a rule that is decidedly contrary to this Court's "rule" that "interpretive doubt is to be resolved in *the veteran's* favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (emphasis added). Once the Solicitor General's waiver arguments are revealed for what they are – a smokescreen – it becomes possible to understand the importance of the basic issue presented. The Petition should be granted.

1. The Solicitor General's two waiver arguments can be dispatched in short order.

a. He first argues (Opp. 5) that the conflict between the rule of *Brown v. Gardner* and the general rule of deference to administrative agencies, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "is not presented by this case." This is so, in his view, because "[t]he Federal Circuit neither addressed nor decided such an issue in its opinion." Opp. 5. This is both irrelevant and untrue.

The fact of the matter is that there was no need for the Court to expound upon (or even reference) this conflict because, as noted without contravention in the Petition (14-15), the Federal Circuit has *already* resolved that conflict in favor of deference and against the veteran. See, *e.g., Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997) (employing *Chevron* deference as basis for rejecting veteran's interpretation of an ambiguous provision of the veterans statutes). It makes little sense to oppose the Petition on the ground that the decision below did not "decide[ ]" (Opp. 5) a question that the Circuit has already decided. Naturally, it is to be presumed that the panel decided this case in accordance with established Circuit precedent, which will remain binding absent intervention by this Court.

The Solicitor General's naked assertion (Opp. 5) that the Federal Circuit did not "in any way defer to the VA's interpretation of [38 U.S.C.] Section 5101(a)" is refuted by the court of appeals' own opinion. The court below rejected Mr. Fleshman's interpretation of the statute, not

based on any "clear and unambiguous language" (Opp. 5), but rather because his interpretation was not "compelled" by the text of the statute. Pet. App. 5a. Under "the rule that interpretive doubt is to be resolved in the veteran's favor" (*Gardner*, 513 U.S. at 118), however, it is the *government's* interpretation – not the veteran's – that must be "compelled" by the statute to be sustained.

Moreover, although the Solicitor General prefers to ignore the point, the court of appeals rejected Mr. Fleshman's contentions because, in its view, "the [VA] Secretary *reasonably regarded* [a signature] as necessary to enable the agency to process the claim." Pet. App. 7a (emphasis added). This, of course, is the very language of *Chevron* deference (see, *e.g.*, 467 U.S. at 842) – which explains why the Solicitor General has swept it under the rug. The court therefore *did* defer to the VA's reading of § 5101(a), as was only proper under settled precedent from the Federal Circuit. Having done so, there can be no question of this Court's authority to review that Circuit precedent for consistency with controlling decisions from this Court, particularly where, as here, those decisions in themselves are in conflict. Needless to say, only this Court can authoritatively resolve a conflict in its cases.

b. The Solicitor General's other waiver argument – that question two was not raised below – is simply baffling. This *entire* case, from the administrative phase to the Court, has been an effort by Mr. Fleshman to obtain an earlier effective date for his disability benefits pursuant to 38 U.S.C. § 5110(b)(1). That statute provides that an award of benefits is to be effective as of the date following the veteran's discharge from active duty, rather than the date on which an application is received, "if

application therefore is received within one year from such date of discharge." *Id.* At *every* level of this case, Mr. Fleshman has argued that section 5110(b)(1) governs because his original unsigned application was received within that time period.

For instance, Mr. Fleshman faulted the VA for "not apply[ing] § 5110(b)(1)" and argued that "the application of § 5110(b)(1) would result in the October 9, 1987 effective date Mr. Fleshman seeks in this proceeding because his initial application was filed within one year (indeed, within one month) of his honorable discharge from the Army." Opening Brief for Appellant, Fed. Cir. No. 97-7029, at 14 (filed April 15, 1997). After attacking several grounds relied upon by the Court of Veterans Appeals ("CVA") for not applying section 5110(b)(1), Mr. Fleshman turned to the meaning of "application" as used in that subsection: "[B]y virtue of the presumption that Congress ordinarily uses words in their plain usage, as reflected in dictionary definitions, the meaning of 'application' becomes clear: In this context, an 'application' is '[a] request, as for assistance, employment, or admission to a school.' *Despite the lack of signature, application date, and mailing address, Mr. Fleshman's 1987 application clearly constituted a 'request' for benefits, and so he is entitled to the October 1987 effective date*[.]" *Id.* at 23 (emphasis added; citations omitted).

Finally, consistent with his common-sense view that an unsigned application is nevertheless an "application," Mr. Fleshman prayed that the CVA's decision denying him an October 9, 1987, be reversed "with instructions to award him disability benefits retroactive to that date from January 30, 1992," the date of his second application. *Id.*

at 33. In light of these (and other) unequivocal claims by Mr. Fleshman to an effective date pursuant to section 5110(b)(1), the Solicitor General's assertion that question two was not raised below is, to say the least, puzzling indeed.

2. Rather than reargue the merits of the questions presented at this juncture, several observations are appropriate in closing. First, the Solicitor General does not dispute the importance of question one to the proper administration of the veterans benefits laws. Second, in like manner, he makes no argument whatsoever in opposition to Mr. Fleshman's showing (Pet. 11-15) that the rules of *Chevron* and *Brown v. Gardner* are in flat – and *acknowledged* (*Gardner*, 513 U.S. at 117-18) – conflict. With the importance of this certworthy issue all but conceded by the Solicitor General, Mr. Fleshman respectfully submits that a writ of certiorari should issue in this case to decide, once and for all, whether veterans, who have served their country at great sacrifice and often at great risk to their personal safety, should be granted the benefit of the doubt when the fate of their applications for benefits turns on ambiguous statutes.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JEFFREY T. GREEN*
STEPHEN F. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Petitioner

October 6, 1998 **Counsel of Record*